

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-7556

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARINE CARRIERS CORPORATION,

Plaintiff-Appellee,

versus

DIRECTOR GENERAL OF INDIA SUPPLY MISSION and
REGIONAL DIRECTOR OF FOOD—WESTERN REGION,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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The parties are in agreement as to the principles of law which control this case.

One issue remains: Would the AVENGER have proceeded to Fairway Anchorage if upon departing Beaumont, harbor chart C.&G.S. #517 was aboard? The answer is dispositive of this appeal. The Trial Court did not make any finding on this issue. This Court can either remand or decide the question *de novo*. *Ezekiel v. Volusia S.S. Co.*, 297 F.2d 215, 216-17 (2d Cir. 1961).

Plaintiff tacitly concedes that if chart #517 had explicitly labeled the anchorage at Sabine Pass as "Sabine Anchorage", then the absence of the chart from the AVENGER would have concurred to proximately cause the stranding. (Brief for Appellee at 2, 5—conclusion #1.)

Defendants have demonstrated that if chart #517 had been aboard the AVENGER, then Captain Blank would have consulted it. (Brief for Appellant at 10.) Upon consulting chart #517, he would have learned that there were two

anchorage—one at Sabine Pass and one at Fairway. He would have concluded that Sabine Anchorage was at Sabine Pass, not at Fairway. At the very least he would have inquired of the Coast Guard as to the location of the anchorage where he had been ordered.

Plaintiff argues that Capt in Blank did not anchor the AVENGER at the anchorage at Sabine Pass because the pilot “recommended against its use. . . .” (Brief for Appellee at 5 citing 223a.) This argument suggests that Captain Blank would have disobeyed Coast Guard orders and opted to follow the advice of a harbor pilot. It is preposterous to state that Blank would have blithely sailed past the anchorage at Sabine Pass when he was sailing under the authority of a United States Coast Guard Master’s License, in United States waters, pursuant to specific United States Coast Guard orders where the Coast Guard would continue its inspection of the AVENGER. Indeed, Blank was confident that he was following instructions. (Brief for Appellee at 4.)

Captain Blank had previously testified that there had been no conversations between the pilot and himself as to the destination of the AVENGER. (Def. Ex. B at 68-69—not in Joint Appendix.)¹ He learned for the first time that there was “another position within the channel known as Sabine Anchorage” only after the stranding. (173a.) At the Coast Guard hearing directed against the Master’s license of Blank, he did not inform the Coast Guard of this alleged conversation with the pilot. One would expect that he would have in order to explain his confusion regarding the location of the Sabine Anchorage. At his deposition greater than three years after the stranding, Blank

¹ Pilot Throgmorton testified at the hearing that he was told to take the AVENGER to the sea buoy. (Def. Ex. B at 12-14—Not in Joint Appendix.)

alleges this conversation with the pilot. His deposition testimony, which directly conflicts with his testimony given at the hearing shortly after the stranding, should be characterized as what it is—false.

Plaintiff urges that this Court apply the “clearly erroneous” rule of *McAllister v. United States*, 348 U.S. 19. (Brief for Appellee at 5.) The rule is not applicable to this case because the factual testimony was based exclusively upon documents and depositions, *J. Gerber & Co. v. S.S. Sabine Howaldt*, 437 F.2d 580, 586, 1971 A.M.C. 539, 545 (2d Cir. 1971), and the Trial Court made no finding concerning the failure of the AVENGER to have chart C.G.&S. #517.

Plaintiff would parallel this case with *American Smelting and Refining Co. v. S.S. Irish Spruce*, Docket Nos. 75-7411, 75-7445 (2d Cir., filed Jan. 17, 1977). (Brief for Appellee at 5.) Defendants reject plaintiff’s premise. Furthermore, the *Irish Spruce* involved navigational information which was aboard the vessel. This case involves navigational information which was not aboard.

Plaintiff offers the conclusion that it exercised due diligence to obtain the chart. (Brief for Appellee at 6.) It spares itself the embarrassment of so arguing for the obvious reason that Blank characterized his efforts to obtain the chart as “overtures.” Neither the plaintiff nor its local agent furnished any testimony setting forth what was done to obtain the chart or explain why it was not available. Plaintiff has failed to establish due diligence to obtain the chart in question.

CONCLUSION

The judgment of the Court below which allowed plaintiff to recover of defendants in general average should be reversed and the complaint should be dismissed with costs in that and in this proceeding.

Respectfully submitted,

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Reply Brief IS HEREBY ADMITTED
THIS *1st* DAY OF *April* 1977

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